IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26898-5-III**
	)	**(consolidated with**
Respondent,	)	**No. 26974-4-III)**
	)	
v.	)	**Division Three**
	)	
JAMES CARL METCALF,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**
	)	
In re Personal Restraint Petition of:	)	
	)	
JAMES CARL METCALF	)	
	)	

Brown, J. ─ James Metcalf appeals his second degree murder conviction for the 2004 death of Denise McCormick and his exceptional sentence based on jury findings of sexual-motivation and victim-vulnerability aggravating factors. Mr. Metcalf contends the trial court erred in denying his CrR 3.5 motion to suppress his pre-*Miranda* statements and in making certain evidence rulings. Mr. Metcalf argues insufficient evidence supports the aggravating factors and that the court erred by imposing an exceptional sentence based on victim vulnerability due to intoxication. Pro se, Mr.

Metcalf raises additional grounds of ineffective assistance of counsel and alleges improper use of sexual motivation as an aggravating factor. In his consolidated personal restraint petition (PRP), Mr. Metcalf again alleges ineffective assistance of counsel. We affirm. Mr. Metcalf's PRP is denied.

FACTS

On the evening of February 27, 2004, Mr. Metcalf, his co-worker Anthony Martin, and Mr. Martin's girl friend, Nicolette Kershaw, were drinking at Rick's Ringside Bar. The party then went to the Season Ticket, where they ran into Ms. McCormick who was a friend and former co-worker of Ms. Kershaw's. The group continued to drink and bar hop with Mr. Metcalf as the driver. While riding in the seat-less back of Mr. Metcalf's van, Ms. McCormick fell over and bumped her head. The group eventually ended up at Mr. Martin's and Ms. Kershaw's house.

While at the Martin/Kershaw residence, Ms. McCormick continued to drink beer. Ms. Kershaw observed she was "getting pretty intoxicated." Report of Proceedings (RP) at 378. Mr. Martin was not paying close attention to how much Ms. McCormick was drinking but he was "sure" she was intoxicated, although she was still "walking and talking." RP at 423. Mr. Martin observed Mr. Metcalf was also intoxicated.

Antonio Volpe, a friend the party met at one of the bars, also returned to the Martin/Kershaw residence. He described Ms. McCormick as intoxicated and holding hands with Mr. Metcalf when she decided to go home. Mr. Metcalf offered her a ride.

Instead of going home, Ms. McCormick went back to Mr. Metcalf's house where he claimed they watched pornography and then began to have sex. During sex, Mr. Metcalf testified Ms. McCormick took his hands and placed them around her neck and began to squeeze. After sex, he saw Ms. McCormick was not moving and then discovered she was dead. Mr. Metcalf testified he then panicked and drove to the Long Lake area where he rolled her body down a hill toward the lake.

A few hours later, a man looking for a fishing location discovered Ms. McCormick's body. On March 1, 2004, Detective David Baskin and Detective Benjamin Paramore of the Stevens County Sheriff's Department contacted Mr. Metcalf at his home. Mr. Metcalf let the detectives in and agreed to speak to them. Another officer stood inside the residence near the door, talking to Mr. Metcalf's son. Several other officers remained outside. Detective Baskin and Detective Paramore did not provide *Miranda*[1] warnings to Mr. Metcalf.

The detectives opined that if Mr. Metcalf had asked them to leave they would have. He was not under arrest. The detectives stated that Mr. Metcalf was free to not answer their questions. Mr. Metcalf then related his version of the events. Concerned over inconsistencies, the detectives then took him to the police station to answer more questions. At the police station, Mr. Metcalf was read his *Miranda* warnings. Mr. Metcalf agreed to waive his rights and again related his version of events.

[1] *Miranda v. Arizona*, 384 U.S. 436, 471-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Officers outside Mr. Metcalf's home observed a diamond-patterned floor mat in the back of his van. A diamond-shaped pattern was discovered on the back of Ms. McCormick's legs. Additionally, Ms. McCormick's blood was found in the back of the van. A vaginal swab of Ms. McCormick revealed a DNA (deoxyribonucleic acid) match with Mr. Metcalf.

The State charged Mr. Metcalf with second degree murder with sexual motivation. The State further alleged the aggravating factors of victim vulnerability and sexual motivation. The trial court denied Mr. Metcalf's CrR 3.5 motion to suppress his statements made to the detectives at his home, concluding he was not in custody so *Miranda* warnings were not required.

During trial, Dr. Marco Ross testified regarding Ms. McCormick's autopsy. He concluded her cause of death was asphyxia due to strangulation, with contributing blunt force head injuries. Her blood alcohol level was .24. Ms. McCormick had injuries to the back, top, and side of her head caused before or at the time of death, which Dr. Ross opined was consistent with a physical assault rather than an accident. Dr. Ross also opined that based on injury to the neck and the amount of hemorrhage present in the neck, a person applying pressure to the neck would know that the victim was being harmed (i.e., strangulated). After viewing a picture of a steel bar found in Mr. Metcalf's van, Dr. Ross testified it could have been used to cause Ms. McCormick's injuries.

The steel bar (Ex. 121) and a picture of the bar (Ex. 116) were admitted over

defense objection. The bar was left in Mr. Metcalf's van until right before trial, which took place over three and one-half years after his arrest and the van's impoundment. The State had provided a photograph of the bar to defense counsel at the beginning of the case. The bar was not forensically tested.

Defense witness Jay Wiseman, an educator on alternative sexuality issues, testified regarding auto-erotic asphyxiation -- sexual gratification that may occur through the act of choking. Mr. Metcalf claimed this was the activity Ms. McCormick was engaged in when she allegedly brought his hands to her neck, and he denied hitting her with the pipe. On cross-examination, Mr. Wiseman conceded that this type of activity would not involve someone being hit on the head repeatedly or cause severe injuries. Another defense witness, Dr. Mark Mays opined that the more alcohol consumed the less likely an individual is able to defend herself or himself.

The jury found Mr. Metcalf guilty as charged, and found aggravating factors of sexual motivation and victim vulnerability. Mr. Metcalf's standard range sentence was 123-220 months, but the court enhanced Mr. Metcalf's sentence to a minimum of 360 months and a maximum of life due to the aggravating factors. He appealed.

ANALYSIS

A. Pre-*Miranda* Statements

The issue is whether the trial court erred in denying Mr. Metcalf's CrR 3.5 motion to suppress his statements made to detectives at his residence. Mr. Metcalf contends

the statements were made during a custodial interrogation, requiring *Miranda* warnings.

Under the federal and state constitutions, a defendant possesses rights against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. *Miranda* warnings protect these rights in custodial interrogation situations. *State v. Lorenz,* 152 Wn.2d 22, 36, 93 P.3d 133 (2004). But outside the context of custodial interrogation, *Miranda* does not apply. *Roberts v. United States,* 445 U.S. 552, 560, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980).

Our courts determine if an interrogation is custodial using an objective standard, "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *Lorenz,* 152 Wn.2d at 36-37 (citing *Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). We examine a trial court's findings from a CrR 3.5 hearing for substantial evidence, but we review the trial court's determination of custody de novo. *Lorenz,* 152 Wn.2d at 36 (citing *State v. Broadaway,* 133 Wn.2d 118, 131, 942 P.2d 363 (1997)).

In *State v. N.M.K.*, 129 Wn. App. 155, 160-61, 118 P.3d 368 (2005), officers questioning a juvenile did not handcuff the juvenile and never told the juvenile he was not free to leave. The court held *Miranda* warnings were not required. Division One of this court in *State v. S.J.W.*, ___ Wn. App. ___, 206 P.3d 355, 364 (2009), recently noted the significance of the interview taking place "in a private residence familiar [to the defendant]."

Here, the court found Mr. Metcalf let Detective Baskin and Detective Paramore into his home and that if Mr. Metcalf had asked to leave, he would have been allowed to do so. These findings are unchallenged and, therefore, verities on appeal. *Broadaway*, 133 Wn.2d at 131. Further, Mr. Metcalf was not handcuffed nor was he told he could not leave. Given these facts, Mr. Metcalf's statements were made outside the context of custodial interrogation; therefore, the court did not err in deciding *Miranda* did not apply. Moreover, any error would be harmless. Mr. Metcalf has maintained the same defense; the death was an accident occurring during consensual sex play. While some inconsistencies in his statements exist between his pre-*Miranda* statement and his post-*Miranda* statement, the crux of his story has not changed.

B. Evidence Ruling

The next issue is whether the trial court erred by abusing its discretion in admitting the steel bar found in Mr. Metcalf's van and a photograph of the bar. Mr. Metcalf contends this evidence should have been excluded because its probative value is outweighed by unfair prejudice and because Mr. Metcalf was unaware the bar would be admitted until just a few days before trial.

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Thomas,* 150 Wn.2d 821, 856, 83 P.3d 970 (2004). We will reverse if no reasonable person would have decided the matter as the trial court did. *Id.*

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." But relevant evidence is still not admissible if its probative value is outweighed by unfair prejudice. ER 403. Unfair prejudice is that which is more likely to arouse an emotional response rather than a rational decision by the jury. *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). "'[W]hether evidence *actually plays a part* in a crime is not the definition of relevant evidence.'" *State v. Burkins,* 94 Wn. App. 677, 693, 973 P.2d 15 (1999) (quoting *State v. Quigg,* 72 Wn. App. 828, 838, 866 P.2d 655 (1994)).

Here, the steel bar was relevant because it has a tendency to make Dr. Ross' testimony that Ms McCormick's injuries were caused by such an object more probable. The bar and photograph were used to rebut Mr. Metcalf's claim that Ms. McCormick's injuries may have been caused by her falling in the back of his van while they were bar hoping. The picture of the bar located inside Mr. Metcalf's van had been part of the discovery, and given to defense counsel at the beginning of the case. Mr. Metcalf fails to show surprise or unfair prejudice in allowing this evidence. Mr. Metcalf was able to negate the prejudice through his testimony and the jury resolved the factual issue. We cannot say the trial court erred in deciding the exhibits' probative value was not outweighed by unfair prejudice.

C. Evidence Sufficiency

The issue is whether sufficient evidence supports Mr. Metcalf's second degree murder conviction and the aggravating factors of sexual motivation and victim vulnerability.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *Thomas,* 150 Wn.2d at 874; *State v. Green,* 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). "'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.'" *Thomas,* 150 Wn.2d at 874 (quoting *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial and direct evidence are considered equally reliable. *Thomas,* 150 Wn.2d at 874. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *Id.* at 874-75.

A person is guilty of second degree murder when "[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person." RCW 9A.32.050(1)(a). During trial, Dr. Ross testified that the cause of Ms. McCormick's death was asphyxia due to strangulation with contributing blunt force head injuries. She had several injuries to her head. He opined these injuries were consistent with an assault and not an accident. Mr. Metcalf's own expert testified these injuries were not consistent with consensual sexual asphyxiation. While Mr. Metcalf contends Ms. McCormick's death was an accident, the trier of fact was free to weigh the

conflicting evidence and conclude otherwise. Drawing all reasonable inferences for the State, the evidence supports finding Mr. Metcalf guilty of second degree murder.

"'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." Former RCW 9.94A.030(39) (2003), *recodified as* RCW 9.94A.030(47). A sexual motivation finding must "be made by a jury beyond a reasonable doubt." *State v. Gonzales Flores*, 164 Wn.2d 1, 20, 186 P.3d 1038 (2008); RCW 9.94A.835. A jury's finding regarding the presence of an aggravating factor is a factual determination which will be upheld unless clearly erroneous. *State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008).

Here, Mr. Metcalf admitted choking Ms. McCormick during sex. Mr. Wiseman testified that sexual gratification while choking one's partner "adds to the erotic intensity and enjoyment of the experience." RP at 818. Further, Ms. McCormick's body was found almost completely naked with a diamond-shape pattern on the back of her legs. This pattern matched the floor of Mr. Metcalf's van. These facts suggest post-mortem sex. Both auto-erotic asphyxiation and post-mortem intercourse support a finding of sexual motivation. Accordingly, the jury's sexual motivation finding is supported by the record and is not clearly erroneous.

Under RCW 9.94A.535(3)(b), a victim is particularly vulnerable if he or she is "incapable of resistance." To prove a victim's vulnerability as an aggravating factor justifying an exceptional sentence, the State must show "(1) that the defendant knew or

should have known, (2) of the victim's particular vulnerability, and (3) that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman,* 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

We have been unable to find a Washington case where victim vulnerability was found based on intoxication. Other states, however, have considered a victim's vulnerability due to intoxication a reason for departure from a standard range sentence. *State v. Brown*, 783 N.E.2d 539, 553 (Ohio 2002); *Ture v. State,* 353 N.W.2d 518, 522 (Minn.1984); *People v. La Fargue,* 147 Cal. App. 3d 878, 889, 195 Cal. Rptr. 438 (1983).

Evidence of Ms. McCormick's intoxication is well supported in this record through witness testimony, lay and expert, and the blood-alcohol level evidence. From this evidence the jury could find Ms. McCormick's intoxication affected her perception, judgment and reactions. In this sense, she was "incapable of resistance" under RCW 9.94A.535(3)(b). Mr. Metcalf accompanied Ms. McCormick throughout the evening's events and was aware of her condition. The jury could find Mr. Metcalf took advantage of Ms. McCormick's condition to commit second degree murder, satisfying *Suleiman.* Accordingly, the jury's victim vulnerability finding is supported by the record and not clearly erroneous.

D. Exceptional Sentence

The issue is whether Mr. Metcalf's exceptional sentence was clearly excessive. Mr. Metcalf contends insufficient evidence shows victim vulnerability, but as reasoned above, he is incorrect, so we limit our analysis to excessiveness.

In determining whether an exceptional sentence is clearly excessive, we review "whether the trial court abused its discretion by relying on an impermissible reason or unsupported facts." *State v. Halsey*, 140 Wn. App. 313, 324, 165 P.3d 409 (2007). "'Stated otherwise, the "clearly excessive" prong of appellate review under the sentencing reform act gives courts near plenary discretion to affirm the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence.'" *Id.* at 325 (quoting *State v. Creekmore,* 55 Wn. App. 852, 864, 783 P.2d 1068 (1989)). Because Mr. Metcalf solely argues the facts do not support vulnerability and we have concluded otherwise, his excessiveness arguments fail.

E. Statement of Additional Grounds and Personal Restraint Petition

In his statement of additional grounds for review, Mr. Metcalf first contends sexual motivation should not have been charged because it does not apply to cases where consensual intercourse occurs. The legislature, however, expressly requires a special allegation of sexual motivation in non-sex offense cases "when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify

a finding of sexual motivation by a reasonable and objective fact finder." RCW 9.94A.835(1). The purpose of a sexually motivated determination is to hold those offenders who commit sexually motivated crimes more culpable than those offenders who commit non-sexually motivated crimes. *State v. Thomas*, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999). We have concluded sufficient evidence supports Mr. Metcalf's conviction and the jury's sexual motivation finding inherently rejected his consensual sex defense. It follows that the special allegation of sexual motivation was proper.

Next, Mr. Metcalf contends in both his statement of additional grounds for review and his PRP that he was denied effective assistance of counsel. The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22. To prove ineffective assistance of counsel, an appellant must show both deficient performance and prejudice. *In re Pers. Restraint of Woods,* 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Varga,* 151 Wn.2d 179, 198, 86 P.3d 139 (2004). Prejudice occurs when, but for deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle,* 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Additionally, to obtain relief from unlawful restraint, the petitioner must show that he was actually and substantially prejudiced by an error. *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 329, 823 P.2d 492 (1992). Regardless of whether he bases his

challenges on constitutional or nonconstitutional error, he must support his petition with facts or evidence upon which his claims of unlawful restraint are based and not relied solely upon conclusory allegations. *Id.* The evidence presented must consist of more than speculation, conjecture, or inadmissible hearsay. *In re Pers. Restraint of Rice,* 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Mr. Metcalf brought a CrR 8.3 motion to dismiss in the trial court for ineffective assistance of counsel. The court found that his claim that defense counsel failed to contact witnesses was "purely speculative" and there was no showing the witnesses were material. Clerk's Papers at 519. We agree. An attorney's strategic choices are "virtually unchallengeable" and thus are not a basis for finding counsel to be ineffective. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). Nothing in the record suggests defense counsel failed to investigate or cross-examine witnesses. The jury's rejection of Mr. Metcalf's defense does not show deficient performance. Without a showing of deficient performance and/or prejudice, Mr. Metcalf's ineffective assistance of counsel argument fails.

Affirmed. Mr. Metcalf's PRP is denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, A.C.J.

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Sweeney, J.